UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMCOR RIGID PLASTICS

and Case 13–CA–145992

CHICAGO & MIDWEST REGIONAL JOINT BOARD, WORKERS UNITED/SEIU

Christina Hill, Esq.
for the General Counsel.
Frederick L. Schwartz, Esq. and
Lavanga V. Wijekoon, Esq.
for the Respondent.
David P. Lichtman, Esq.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Chicago, Illinois, on July 28, 2015. The Chicago & Midwest Regional Joint Board, Workers United/SEIU (the Charging Party or Union) filed a charge on February 6, 2015, and the General Counsel issued the complaint and notice of hearing in this matter on May 14, 2015.

The complaint alleges that Amcor Rigid Plastics (the Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, since on or about February 4, 2015, failing and refusing orally to execute a written contract containing the agreed upon terms and conditions of employment for the unit employees that the parties reached on November 6, 2014.[1] The Respondent, in its answer, denied that it violated the Act as alleged.

[1] All dates are 2014, unless otherwise indicated.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Batavia, Illinois, has been engaged in the manufacture and nonretail sale of plastic bottles. Annually, the Respondent, in conducting its business operations described above, sold and shipped from its Batavia, Illinois, facility goods valued in excess of $50,000 directly to points located outside the State of Illinois.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

The Respondent and the Union have had a collective-bargaining relationship since the first contract was negotiated in 2010. That collective-bargaining agreement was effective by its terms from November 1, 2010 through October 31, 2014. At all material times, the Union has been designated as the exclusive collective-bargaining representative of the Respondent's approximately 100 employees in the following appropriate unit:

> All full-time and regular part-time hourly paid production and maintenance employees at the Company's Batavia, Illinois location, but excluding all office clerical, professional employees, confidential employees, technical employees, sales employees, plant clerical employees, guards and supervisors as defined in the "National Labor Relations Act" as amended.

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[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "Jt. Exh." for Joint Exhibit; and "R. Exh." for Respondent's Exhibit.

[3] In making my findings regarding the credible evidence, including the credibility of the witnesses, I consider the testimonial demeanor of such witnesses, the context of the testimony, and the consistency and inherent probabilities based on the record as a whole. In certain instances, I may have credited some but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders, Inc.,* 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

In late September 2014, the parties commenced negotiations for a successor collective-bargaining agreement. The Union's negotiating committee consisted of Union Representative and Lead Negotiator Jose Silva; Local Union President Anthony Stewart (also known as Quenton); Union Vice President Tracy Sheffer; Union Steward and Union Secretary Theresa Susinka; and Union Committee Members Walter Piekarski, Brian Allen, and Greg Boyle. The Respondent's negotiating committee consisted of Respondent Counsel and lead negotiator Frederick Schwartz; Respondent Counsel Lavanga Wijekoon; Human Resource Manager Kari Johnson; and Human Resource Generalist Mary Lobezoo.

2. The Sub-Holiday Provision

As will be discussed in great detail below, the question of whether the parties reached an agreement on the terms and conditions of employment for the unit employees in a successor collective-bargaining agreement is focused on whether they agreed to keep one key clause originally contained in the 2010–2014 collective-bargaining agreement: Article X (Vacations), Section 5, which the parties refer to as the "sub-holiday" provision. (Jt. Exh. 1).[4] That provision provides:

> Section 5: Holidays which Fall during Scheduled Vacations
>
> When holidays fall within a plant vacation shutdown the shutdown period will be extended by the number of such holidays. In the event one of the holidays set forth in Article IX, Section 1 falls within a vacation period, an employee may make arrangements to request an additional day off, if he so desires, during the calendar year in which the holiday is observed. Any such day shall be requested in advance and would require approval of the supervisor. (Jt. Exh. 1).

As referenced in the sub-holiday provision, Article IX: Holidays (8-Hour and 12-Hour Schedule), Section 1, sets forth the "Scheduled Holidays" and provides that "the following days shall be observed as holidays in this plant: New Years Day, Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Day after Thanksgiving, Christmas Eve, Christmas Day, and New Years Eve." (Jt. Exh. 1). Thus, under the 2010–2014 collective-bargaining agreement, when employees' vacations fell on a holiday that was recognized in Article IX, Sec. 1, employees could substitute that day for another day during the calendar year. Among the Respondent's approximately 87 plants in the United States, the sub-holiday provision is only applicable to the unit employees in the Respondent's Batavia, Illinois plant, and the Respondent viewed the provision as an "administrative issue" that it wanted to remove from the contract.

3. The bargaining leading up to the November 6, 2014 session

The parties' negotiations consisted of 8 bargaining sessions on the following dates: September 30, October 1, 2, 14, 15, 16, and 24, and November 6. While Schwarz was present at all the bargaining sessions, Union Counsel Robert Cervone was only present at the November 6 bargaining session, where he served as the lead negotiator for the Union.

[4] For simplicity, Article X, Section 5 is sometimes referred to herein as Article 10, Sec.5, in English or regular numerals as opposed to Roman numerals.

In the first bargaining session, Schwartz, as Respondent's Counsel and lead negotiator, proposed that Article 10, Sec. 5, the sub-holiday provision, be removed from the contract, along with various other provisions. The record reveals there was no comment or discussion by the Union about the sub-holiday provision in that bargaining session. Consistent with the Respondent's statement that it wanted to remove the sub-holiday provision from the contract, the Respondent's September 30, 2014 contract proposal contained the Article 10, Sec. 5 sub-holiday provision in the text of the document, with a red line through the entire provision (sometimes referred to as "red-lined" or "red-line stricken"). (Jt. Exh. 2, p.10).[5]

In the bargaining sessions that followed on October 1, 2, 14, 15, 16, and 24, the parties' did not mention or discuss the sub-holiday provision. The Respondent offered two proposals on October 14. The first contained the Article 10, Sec. 5 sub-holiday language in the text of the document, but it was red-line stricken. (Jt. Exh. 3, p. 10). The second October 14 proposal also contained a red-line stricken Article 10, Sec. 5 sub-holiday provision. (Jt. Exh. 4, p. 10). Likewise, the Respondent's October 24 proposal contained the red-lined stricken text of the sub-holiday provision, the only difference being that the Respondent re-numbered it as "Section 4" rather than "Section 5." (Jt. Exh. 5, p. 10).

With regard to the October 24 bargaining session, Silva testified that on that date, the parties agreed to have the sub-holiday provision remain in the contract. (Tr. 28). While I have found that Silva was a credible witness for the reasons stated below in the "credibility determination" section of this decision, I find that his vague assertion that the Respondent agreed on October 24 to keep the sub-holiday provision in the contract is not supported by the record. In fact, the record failed to establish that the parties at any time in the negotiations prior to November 6, discussed the sub-holiday provision after the Respondent's initial statement that it wished to remove the provision from the contract. Silva's assertion that there was an agreement to keep the sub-holiday provision in the draft proposal is also not supported by the fact that the Respondent submitted a proposed agreement that day which had the sub-holiday provision stricken. (Jt. Exh. 5, p. 10).

On October 27, Schwartz emailed Silva another proposed agreement, identified in the "subject" line of the email as "Changes to Final CBA: Discussion." (Jt. Exh. 7). In that email Schwartz stated: "[a]ttached is the draft of the tentative agreement on all terms." That document, identified as Jt. Exh. 6 in the record, contained the text of the Respondent's previously proposed contracts, but for the first time the proposed deleted provisions and comments were set forth in smaller sized print in boxed sections along the right side margins of the pages with corresponding dotted lines from the "deleted" or "comment" boxed text over to the body of the agreement, apparently indicating the location in the document where the deletions or comments originated. The deleted text was circled or boxed with a red line, and the word "Deleted:" was in bold print and preceded the body of the deleted provisions. With regard to the disputed sub-holiday provision, on page 10 of that proposal the text of the sub-holiday

[5] The Article X, Sec. 5 sub-holiday provision in the Respondent's September 30 proposal had the exact wording as the sub-holiday provision in the 2010–2014 collective-bargaining agreement, with one exception--the word "day" in the phrase "Any such day shall be requested" was made plural in the September 30 proposal, and read: "Any such days shall be requested" (Jt. Exh. 2, p. 10).

provision was removed from the body of the draft and set forth in a deleted box on the right side margin of the page, with a red-lined box around it. The deleted box containing the sub-holiday provision stated as follows:

> **Deleted:** <#> Holidays which Fall during Scheduled Vacations
> When holidays fall within a plant vacation shutdown the shutdown period will be extended by the number of such holidays. In the event one of the holidays set forth in Article IX, Section 1 falls within a vacation period, an employee may make arrangements to request an additional day off, if he so desires, during the calendar year in which the holiday is observed. Any such day shall be requested in advance and would require approval of the supervisor. (Jt. Exh. 6, p.10).

In an email from Silva to Schwartz dated October 28, 2014 at 8:36 p.m., Silva asked Schwartz to review the calculations on the wage scale for the 12-hour shift schedule on the 3rd and 4th years of the contract, asserting that the Union calculated the wages at a different wage rate, and he provided a copy of the classification and corresponding wage rates in a graph. (Jt. Exh. 7, p. 5). In addition, in another email from Silva to Schwartz dated October 29, 2014 at 10:53 a.m., Silva stated:

> Fred, our notes reflect that Article 10 section 4 below was withdraw [sic] by the company and agreed upon to return to CCL.[6]
>
> Section 4: Scheduling Vacations
> Vacations shall not be carried over from year to year. While the Company will so far as practicable endeavor to grant employees their choice of vacation periods according to seniority, the Company reserves the right to schedule the vacation periods as in its opinion best serves the efficiency of the operations of the Plant. This may include scheduling vacations during temporary shutdowns of the whole Plant or any part of the Plant, [sic] Employees who had their vacation scheduled prior to the announcement of such temporary shutdown will have the option of rescheduling their vacation to be taken during that period. (Jt. Exh.7).

In an email dated October 29, 2014 at 1:07 p.m., Schwartz informed Silva that the Union's calculations did not track the proposal the Respondent made, and Schwartz also stated: "Regarding the vacation question you raised, you are correct, it is CCL." (Jt. Exh. 7).

The record, however, establishes that neither Schwartz, nor any other Respondent official, proposed to remove the Article 10, Sec. 4 "scheduling of vacations" provision from the contract. Silva testified that he meant to convey to the Respondent that he believed there was agreement to keep the sub-holiday provision in the contract, but he mistakenly set forth and provided the text for the scheduling vacation provision, which was never actually at issue. Silva testified that in the earlier proposed contract version, what was once Article 10, Sec.5 sub-holiday (Jt. Exhs. 3 and 4) was then changed by the Respondent to Article 10, Sec.4. (Jt. Exh. 5).

[6] The record reveals that "CCL" is an abbreviation for "current contract language," which apparently reflected the intent to have that language remain in the successor collective-bargaining agreement. (Tr. 27).

Silva admitted that upon realizing he conveyed the wrong provision to Schwartz, he never informed Schwartz about that mistake. Silva thereafter referred the contract issues to Cervone for him to handle. He informed Cervone that the Union had two issues--the wage calculations and the sub-holiday provision. Silva testified that he became aware of his mistake in the email before the ratification vote on November 4, because Cervone caught the mistake and told him the "scheduling vacations provision" was not the provision he wanted.

The Union presented the Respondent's October 27 proposal *sans* the sub-holiday provision to the union membership for a ratification vote on November 4. Silva testified that his legal counsel advised him to present the Respondent's proposal as it was, with the recommendation to the membership that it not be ratified, so that the proposal could be rejected and the parties could continue to bargain. It is thus undisputed that Silva presented the October 27 draft proposal from Schwartz (Jt. Exh. 6) to the union membership on November 4, 2014 for ratification, and he informed the members that he was not recommending ratification of the proposal because there was a dispute over the sub-holiday provision--the Union wanted to keep it in and the Respondent wanted to delete it. (Tr. 71). As a result, the membership did not ratify the proposed contract. Silva testified that he informed the Respondent that the ratification vote was rejected, and the parties decided to go back to the bargaining table on November 6, 2014, for another session.

4. The November 6, 2014 bargaining session

After the ratification failed, the parties met to bargain on November 6, 2014. The Respondent's negotiating committee that day consisted of Schwartz; Wijekoon; Johnson; and Lobezoo. The Union's negotiating committee consisted of Cervone, Silva, Stewart, Sheffer, Susinka, Piekarski, Allen, Boyle, and Elizabeth Robinson (the recording secretary).[7] While the parties agree that they met that day to bargain, and that an agreement was eventually reached and signed at the conclusion of that session, the Respondent's witnesses presented a different version than that presented by the General Counsel's witnesses as to what transpired when the parties met for that session. In short, the General Counsel's witnesses testified that at the conclusion of that session, the parties agreed the sub-holiday provision would remain in the successor agreement, and the Respondent's witnesses testified that the parties agreed not to include the sub-holiday provision. The relevant testimony presented on that issue is as follows.

According to Silva's testimony, the session started by Schwartz asking the union committee why the contract proposal was rejected, and he and Cervone informed Schwartz that there were two issues--the wage calculation was not correct and the Article 10, Sec.5 sub-holiday provision was omitted from the contract. According to Silva, Schwartz said they could work it out. Schwartz asked if they knew of any calculations that could meet what the Union wanted, and Cervone provided some wage calculations to Schwartz. The Respondent's negotiating team then caucused for approximately an hour and a half. When the negotiations resumed, Schwartz presented a new wage scale chart in response to that presented by the Union. Schwartz explained the new wage calculations to the Union, and then the union committee caucused for approximately 15–20 minutes. According to Silva, the parties then met again and Cervone informed Schwartz that the Union was willing to accept the Respondent's new wage calculations

[7] This session was also the only bargaining session that Cervone attended.

with no changes or counter proposals, if the Respondent would agree to keep the Article 10, Sec. 5 sub-holiday provision. Silva testified that Schwartz responded "yes," and at that point, Piekarski asked Schwartz "point blank" if Article 10, Sec. 5 was "going to stay in," and Schwartz said "yes." (Tr. 35). Silva testified that he informed Cervone that he wanted the Respondent's agreement to keep the sub-holiday provision in the contract to be reflected in writing, so Cervone indicated in writing on page 10 of the contract proposal that the sub-holiday provision was going to stay in, and Schwartz agreed and signed off on it. (Jt. Exh. 8, p. 10).

Silva was very clear in his testimony that while the parties were in the process of signing page 10 of the agreement, they never had any discussions regarding the Article 10, Sec. 4 "scheduling vacations" provision, or any other vacation provision other than the sub-holiday provision. In fact, Silva testified that prior to the November 6 session, the Respondent never proposed during any of the bargaining sessions to delete the "scheduling vacations" provision, which immediately preceded the sub-holiday provision in the text of the original contract and in the Respondent's draft proposals. (Tr. 43).

After the parties' reached an agreement and signed off on the proposed wage scale and sub-holiday provision on page 10, they executed the following "Memorandum of Agreement" signed by Cervone for the Union and Schwartz for the Respondent, and dated November 6, 2014:

> This Memorandum of Agreement ("MOU") is entered into by and between AMCOR RIGID PLASTICS USA INC., BATAVIA PLANT, BATAVIA, IL the Employer and the Chicago & Midwest Regional Joint Board, WORKERS UNITED/SEIU, and its local 1557 on this 28th day of October 2014 with an intent to be legally bound.
>
> WHEREAS, the parties are bound to a collective bargaining agreement effective from November 1, 2010 and expiring on October 31, 2014; and
>
> WHEREAS, the parties have reached agreement on the terms on a successor collective bargaining agreement;
>
> NOW, THEREFORE, it is agreed that:
>
> 1. The parties shall enter into a new collective bargaining agreement which incorporates and maintains all of the terms of the collective bargaining agreement effective November 1, 2010 to October 31, 2014 except as specifically modified below or by attachments to this Memorandum.
> 2. The parties will finalize and execute a full collective bargaining agreement setting forth the terms of this MOA as soon as practicable.
> 3. The following changes to the current agreement are attached and have been signed by the parties' representatives.
> 4. Duration: This MOA is effective on November 1, 2014 and expires on October 31, 2018. It will be superseded by the fully executed CBA referred to in paragraph 2, above.
>
> The parties agree that the MOA and the CBA is subject to union ratification. (Jt. Exh.8, p.1).

Silva also testified that the parties attached the MOU and the new wage schedules (Jt. Exh. 8, pp. 2–3), to the front of the contract proposal. (Jt. Exh. 8). Silva then informed the Respondent's committee members that he intended to take the agreement to the members for ratification.

Cervone's testimony corroborated Silva's version of what transpired in the November 6 bargaining session. Like Silva, Cervone testified that when Schwartz asked why the contract was not ratified, he (Cervone) told Schwartz there were two main issues – wages and Article 10, Sec. 5 which the Respondent was proposing to delete. According to Cervone, after the issues were identified, the bulk of the discussion was devoted to wages. They talked about how they could insert additional monies into the wage scale to bring the Union where it needed to be, and Cervone presented some wage calculations to Schwartz. Cervone testified that the Respondent caucused for approximately an hour and a half, and when they resumed bargaining, Schwartz presented a new wage proposal to the Union. The Union then caucused, and according to Cervone, when the parties met again, he informed Schwartz that the Union could accept the new proposal on wages provided the Respondent agreed that the sub-holiday provision would remain in the contract. Cervone testified that Schwartz agreed to his offer.

Similar to Silva, Cervone testified that when Schwartz agreed to keep the sub-holiday provision in the contract, Piekarski asked Schwartz directly if he was going to keep that section in the contract, and Schwartz said "yes, it's going to stay." Cervone also testified that as the parties were discussing the Article 10, Sec. 5 sub-holiday provision, Silva asked him to get the agreement on the sub-holiday provision in writing, so he wrote on the top of page 10 of the Respondent's proposed contract, "stays in," and he drew a line with his pen down to and touching the upper left corner of the red box containing the deleted sub-holiday provision in the right hand margin of the page. Cervone then put his initials and date of 11/6/14 above the "stays in" notation. (Jt. Exh. 8 and Jt. Exh. 13). On the subject of the parties' agreement to keep the sub-holiday provision in the contract, Cervone specifically testified: "when we agreed that former Article 10, Section 5 [was] going to stay in the new collective bargaining agreement, I pointed to the language in the redline document where Mr. Schwartz had proposed to delete it and we said: This is going to stay in the contract," and Schwartz agreed. (Tr. 150). In addition, Cervone testified "I pointed to that box, I drew the line to that box, and I wrote: stays in." (Tr. 150). After Cervone signed page 10, Schwartz signed the document next to the notation and line with the words "for the Company," and he also dated it 11/6/14. Cervone testified that neither Schwartz, nor anyone else from the Respondent's bargaining committee, asked any questions for clarification on what they were signing, expressed confusion over what was agreed to, or asked what the drawn line had indicated.

Piekarski, a current employee of the Respondent and past union president, presented testimony that corroborated that of both Silva and Cervone regarding what was said in that November 6 bargaining session. Piekarski testified that the biggest issues were wages, keeping Easter as a paid holiday, and keeping sub-holidays as current contract language. Specifically, concerning the sub-holiday provision, Piekarski testified that keeping it in the contract was a quid pro quo for the Union's acceptance of the Respondent's new wage proposal. He testified that while the Respondent's negotiating team was "not thrilled with it," at the end of the day, they accepted it. (Tr. 95). He also corroborated the testimonies of Silva and Cervone that Schwartz agreed to keep the sub-holiday provision in the contract. Piekarski testified that when

he specifically asked Schwartz if the sub-holiday provision stayed as "current contract language," Schwartz answered "yes." (Tr. 95).

Schwartz, on the other hand, painted a much different picture of what transpired in the November 6 meeting. Schwartz, a management labor and employment attorney with over 25 years of experience, testified that he had negotiated over 100 collective-bargaining agreements over his career, and he described himself as an "experienced labor attorney." (Tr. 281). Schwartz, along with Johnson, testified that removing the sub-holiday provision from the contract was one of the Respondent's prime objectives in the negotiations for the successor agreement, and on that basis, there was little surprise for the union negotiating committee when Schwartz proposed deleting the sub-holiday provision in the September 30 bargaining session. He also testified that in that meeting, the Union did not register an objection to his proposal. In fact, Schwartz testified that the sub-holiday provision was never brought up again during bargaining by either party, and the Union submitted the Respondent's proposal that did not contain the sub-holiday provision to the membership for ratification. According to Schwartz, after the ratification failed, Silva informed him via email that the only issues were wages and keeping Article 10, Sec. 4 (Scheduling Vacations) in the contract (which Silva admitted was a mistaken referral to the sub-holiday provision).

With regard to the November 6 bargaining session, Schwartz testified that when he asked the Union why the ratification failed, Cervone told him it was due to the wages, and that Cervone never mentioned anything about the omission of the sub-holiday provision. Schwartz admits to adjusting the wages and presenting a new wage proposal to the Union, and that the Union agreed to his restructuring of the wages. Contrary to the testimonies of Silva, Cervone, and Piekarski, however, Schwartz denied that Cervone said anything about keeping the Article 10, Sec. 5 sub-holiday provision in the contract, and he denied being specifically asked about the sub-holiday provision by Piekarski before signing page 10 of the proposed contract.

Schwartz admitted that he signed page 10 of the contract proposal after Cervone wrote "stays in," drew the line to the deleted sub-holiday provision, and signed it for the Union. However, Schwartz testified that he initialed page 10 because prior to that meeting he had an email inquiry from Silva regarding the language of Article 10, Sec. 4 Scheduling Vacations, and he "wanted to make sure that Mr. Silva understood that [he] was in agreement with his email." (Tr. 272). According to Schwartz, as he was signing page 10, he looked up at Silva and said: "This is regarding the emails we had" and Silva nodded "in affirmance." (Tr. 272). The General Counsel's witnesses, however, denied that Schwartz made any qualifying statements about the fact that "stays in" referenced earlier emails or anything to that effect. (Tr. 124).

According to Schwartz's testimony, he did not understand that "stays in" meant he was agreeing the sub-holiday provision stayed in the contract. (Tr. 299). Instead, Schwartz testified that he agreed to make the reference to Cervone's handwritten statement: "stays in" on page 10, because the Sec. 4 Scheduling Vacations provision became renumbered, and he was "agreeing to keep Sec. 4 per Silva's email." (Tr. 273). When asked on direct examination what Cervone said about signing "this particular language," Schwartz answered: "He indicated to me that Jose [Silva] wanted it signed because there had been questions raised about the provision." (Tr. 273–274). Schwartz added: "I didn't ask him what he meant by that, but what I interpreted that to mean was the e-mails that Mr. Silva and I had had regarding Section 4." (Tr. 274). Schwartz

admitted on cross-examination that he did not ask Cervone for clarification as to what he was agreeing to sign off on, and he did not ask Cervone or Silva what was meant by writing "stays in" on page 10. Despite Schwartz's assertion that he believed he was agreeing to keep the Article 10, Sec. 4 Scheduling Vacations language in the contract, he admitted on cross-examination that the Respondent never proposed deleting the Article 10, Sec. 4 Scheduling Vacations language from the contract proposals in the first place. (Tr. 281). Finally, Schwartz testified that the first time he learned the Union was alleging the Respondent agreed to keep the sub-holiday provision in the contract, was when he reviewed Silva's December 1 email to Johnson. (Jt. Exh. 10).

Johnson, the Respondent's human resource manager at the Batavia, Illinois facility since April 2014, testified that the Respondent's objectives for the successor contract bargaining were: removing holidays, removing sub-holidays, wages, removing pyramiding of overtime, and changing the way vacation was paid. (Tr. 175). She testified that after Schwartz's initial proposal on September 30 to remove the sub-holiday provision, no one brought it up again, and the Union never objected to the fact that the provision was removed from the proposed tentative agreement.

With regard to the November 6 bargaining session, Johnson testified that she did not remember Schwartz or Cervone signing off on page 10 of the proposal, so she did not offer any testimony regarding what was said by Cervone or Schwartz when they were signing the proposed agreement. (Tr. 223; 229–230). She did, however, offer testimony on what transpired in that November 6 bargaining session leading up to the signing of the agreement. Johnson described a somewhat different version of the event than that conveyed by Schwartz. She testified that in the November 6 session, it was brought to her attention that removal of the Easter holiday from the list of recognized holidays in the contract was an issue, along with wages, but that the Union never indicated the sub-holiday provision was an issue. (Tr. 190–191).

Johnson testified that in the November 6 bargaining session, the Union's acceptance of the wage proposal was conditioned on the Respondent leaving something in the contract that the Union wanted in return (Tr. 191–192)—in essence, a quid pro quo. Initially, Johnson testified on direct examination that the item the Union wanted back in order to agree to the wage proposal was the Easter holiday, which the Respondent initially proposed to delete from Article 9, Sec. 1. (Tr. 193) (Jt. Exh. 3, p. 7). Johnson testified on direct examination with regard to this conditional offer as follows:

> Q. During this process, did you have to make a conditional offer to the Union?
> A. Yes. There was a request to make changes to something that I didn't have the authority to do.
> Q. And what were those changes?
> A. Adding the Easter holiday back in. We had previously had an agreement that Easter was not going to be part of the contract.
> Q. Was that in exchange for something else?
> A. Yes. It was my understanding at the end of the negotiations that the Union was willing to agree to our wage proposals if we also agreed to give them back the Easter holiday.

Q. So were sub-holidays part of this conditional offer?
A. They were not.
Q. So you mentioned that you didn't have authority to make the conditional offer.
A. That is correct.
Q. Did you obtain authority to make the conditional offer?
A. Yes. Actually, we requested a caucus so that I could step out of the room and contact my plant manager and let him know what the Union's request was in order to get authorization to allow a change to what we had already agreed to.
Q. And who is the plant manager?
A. Robert Healy.
Q. Do you recall exactly what you told him?
A. I remember saying that: You're not going to really like this. Because I knew that the Easter holiday was important to him, it was another one of those items that no other Amcor location has, and that was kind of the theme, so I thought that he would be upset, so I made the comment to him that: You're not going to like this, but the Union wants the Easter holiday in order to agree to the new wage schedule.
Q. And was this – did you get authority to make this conditional offer?
A. I did. He said: If we can get this done and settle this, then yes, go ahead and give them Easter back, and agreed to their terms.
Q. And did you make this conditional offer to the Union? Did you personally make this conditional offer to the Union?
A. I didn't personally do that, no.
Q. Who did?
A. Mr. Schwartz.
Q. And it was accepted?
A. Yes. My understanding was yes, absolutely.
(Tr. 191-193)

On cross-examination, Johnson elaborated further on the conditional offer and acceptance by the Union, stating that in that session, it was Cervone who told her he could recommend the Respondent's new wage scale proposal if the Respondent agreed to give them back the Easter holiday. (Tr. 221–222).

The record reveals, however, that on further cross-examination Johnson was shown documentary evidence establishing that the Respondent had agreed to reinstate the Easter holiday as a recognized holiday in Article 9, Sec. 1 before the November 6 bargaining session even occurred. Thereafter, she changed her testimony and claimed the conversations about the Easter holiday actually occurred in the October 24 bargaining session, not in the November 6 bargaining session. (Tr. 232).

5. The events following November 6, 2014, and the Respondent's stated refusal to execute any final draft of the collective-bargaining agreement that included the sub-holiday provision.

The agreement (Jt. Exh. 8 and Jt. Exh. 13)[8] was ratified by the membership on November 7, 2014. Silva testified that he texted Schwartz and informed him of the contract ratification. In an email to Silva from Johnson dated November 24, 2014, Johnson attached what she described in the email as the "final CBA ratified Nov. 7, 2014 – clean copy." (Jt. Exh. 9). Silva testified that he reviewed the final draft and found six discrepancies, including the deletion of the sub-holiday provision. In an email dated December 1, 2014, he informed Johnson of the six discrepancies, including the fact that the Article 10, Sec. 5 sub-holiday provision was not in the agreement, and that the parties had agreed it should have remained in the contract. (Jt. Exh. 10). On that same day, Johnson sent a reply email informing Silva that she would "look this over" and get back to him. In an email dated December 18, 2014, Silva asked Johnson if she had a chance to look at the six discrepancies.

In an email to Cervone and Silva dated January 29, 2015, Schwartz addressed the Respondent's failure to include the sub-holiday provision in the final draft of the contract. Schwartz stated that there was an issue regarding the terms of the collective-bargaining agreement. (Jt. Exh. 12). He attached the emails (Jt. Exh. 7) that Silva sent him wherein Silva mistakenly identified Article 10, Sec. 4 Scheduling Vacations as being at issue when he meant to refer to Article 10, Sec. 5 sub-holiday provision. In the January 29 email, Schwartz stated that Silva's emails reflected the company's agreement to keep the current contract language (on scheduling vacations) as is, but on the other hand, the Respondent had proposed all along to delete the sub-holiday provision language, and that deletion was contained in the final proposal and it was not raised as an issue during the emails back and forth regarding Article 10. Schwartz then stated in the email:

> However, the "signed off" document that we initialed on November 6 (also attached) does not clearly identify the Company's agreement to "keep current contract language" regarding Section 4, as reflected in the prior emails. Instead, it could be read to indicate that the Company "agreed" to keep the sub holiday provision in the new agreement. We have reviewed all of the notes and proposals that went back and forth, and there is no indication that we altered our position that sub holidays were to be deleted. I understand the parties are meeting locally next week. We would like this issue to be addressed so that the contract can be finalized. We cannot agree to keep sub holidays, based upon the bargaining history and the position the Company consistently took…. (Jt. Exh.12).

It is undisputed that the parties were able to resolve the discrepancies identified by Silva, with the exception of the deletion of the sub-holiday provision. In a meeting with Johnson on February 4, 2015, Silva informed her that they had a verbal agreement and memorandum of understanding where Schwartz had agreed to include the sub-holiday provision, and that the provision should be included in the final draft so the Union could sign off on it. Silva testified

[8] The record establishes that Jt. Exh. 13 is the same document as Jt. Exh. 8, except that it is a color version of that document.

that Johnson informed him that keeping the sub-holiday provision was "a mistake" and "all along they proposed to delete it." (Tr. 50). Johnson also informed him that the Respondent would not sign a contract with the sub-holiday provision in it. Silva testified that the Respondent has since refused to sign any collective-bargaining agreement that reflects the terms of the agreement reached on November 6, 2014.

Johnson testified that since informing the Union that the Respondent would not sign the collective-bargaining agreement, the Respondent has been following the terms and conditions of the ratified agreement (Jt. Exhs. 8 and 13), but has been denying employee requests for sub-holidays. (Tr. 204). In this regard, the record contains a letter dated November 11, 2014, from Human Resource Generalist Marie Lobbezoo to employee Salomon Galvan regarding his "Request to 'Sub' Holidays in December 2014." In that letter, she advised the employee that "based on the recently ratified union contract, employees will not be allowed to move or 'sub' Holidays to a date other than the actual date on which the Holiday occurs" and that such requests "will not be honored." (R. Exh. 1). The record does not reflect how many employees, other than Galvan, were affected by the Respondent's refusal to implement the sub-holiday provision.

B. The Credibility Determinations

It is undisputed that on November 6, 2014, the parties reached agreement on a successor contract. The complaint alleges, and the Respondent admitted, that the parties "reached complete agreement on the Unit's terms and conditions of employment to be incorporated in a collective-bargaining agreement." (GC Exh. 1(d) and 1(f)). The parties, however, disagree over what was agreed to, and they have offered different versions of what was said in the post ratification rejection bargaining session on November 6. As mentioned above, General Counsel witnesses Cervone, Silva, and Piekarski testified that in the November 6 bargaining session, the Union offered to accept the Respondent's wage proposal if the Respondent agreed to keep the sub-holiday provision in the contract, and that the Respondent, through Schwartz, unequivocally agreed to keep the sub-holiday provision in the contract. Conversely, Respondent witnesses Schwartz and Johnson testified that the Union never raised the sub-holiday provision as an issue in that session, and specifically, Schwartz testified that he did not agree to keep the sub-holiday provision in the successor agreement.

As the versions of what was agreed to in the November 6 bargaining session differ on this critical issue, as the finder of fact, I must determine the credibility of these witnesses. Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.*, 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). See also *J. Shaw Associates*, *LLC*, 349 NLRB 939, 939–940 (2007).

My overall observation during the trial was that the General Counsel's witnesses were very credible in their testimony and demeanor, and that they testified in convincing, straight forward, and consistent manners which were indicative of truthfulness. In particular, I find that they provided clear, detailed and mutually corroborative testimony with regard to what transpired at the November 6, 2014 bargaining session. On the other hand, Respondent witnesses Johnson and Schwartz testified in a less convincing manner, and were at times inconsistent, vague, evasive, and presented testimony that was self-serving, unbelievable, implausible, and less than forthright.

With regard to the General Counsel's witnesses, I find Silva testified in an honest and straight forward manner. Although he asserted that the Respondent agreed on October 24 to keep the sub-holiday provision in the contract, while the record did not support that assertion, such a discrepancy is insufficient to affect the credibility of his assertions as to what was said and agreed to in the November 6 bargaining session. I find that Silva's testimony with regard to what was agreed upon in that session was reliable and honest, and it was not only consistent with the testimonies of both Piekarski and Cervone, it was consistent with the documentary evidence establishing that Schwartz agreed to (and signed off on) the notation that the sub-holiday provision "stays in" the contract. (Jt. Exh. 8, p. 10).

Piekarski, a current employee who offered testimony in opposition to the Respondent's interests, testified in a sincere, unrehearsed, and very convincing manner, despite the fact that he appeared to be mistaken with regard to his testimony that the Easter holiday was an issue in the November 6 bargaining session. I find that he presented credible and honest testimony regarding the fact that the Union conditioned acceptance of the Respondent's wage proposal on Schwartz's agreement to keep the sub-holiday provision in the contract. Piekarski also testified that he had not provided the General Counsel with affidavit testimony during the investigation of the charge, and that he had only briefly spoken with Counsel for the General Counsel via telephone a few days before the trial commenced. (Tr. 97). Piekarski's testimony thus revealed that he was an unrehearsed witness who had minimal interaction with Counsel for the General Counsel prior to the trial. In addition, Piekarski's testimony was particularly reliable, as it is well settled that the testimony of current employees that contradicts that of their employer is "particularly reliable because [the employees] are testifying adversely to their pecuniary interests." *The Avenue Care and Rehabilitation Center*, 360 NLRB No. 24, slip op. at 1, fn. 2 (2014); *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006), quoting *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996); see also *Gold Standard Enterprises*, *Inc.,* 234 NLRB 618 (1978). Thus, I find that Piekarski's current employment status serves as a significant factor in my determination that he was a credible witness.

Of all the General Counsel's witnesses, however, I was most impressed with Cervone's demeanor and testimony. He testified in a very credible and sincere manner, displaying an accurate recollection of the details of the November 6 meeting that was consistent with the testimony offered by Silva and Piekarski, and most importantly, it was plausible and consistent with the undisputed documentary evidence. Cervone's testimony that Schwartz agreed to his offer that the Union would accept the Respondent's proposed wage calculations if the Respondent agreed to keep the sub-holiday provision in the contract, is directly supported by the fact that on page 10 of the document, Cervone wrote "stays in" and drew a line from that

annotation to the sub-holiday provision in the deleted section found in the right hand margin of the page, and that Schwartz agreed that the provision would stay in, and he signed off on it.

The Respondent's witnesses, on the other hand, were not credible, and they presented testimony replete with contradiction. Johnson testified in a manner that was inconsistent, unpersuasive, and at times vague and evasive. With regard to Johnson's testimony that the parties allegedly agreed to remove the sub-holiday provision from the contract prior to November 6, she was purposely vague and despite that assertion, she testified that she did not recall how that agreement came about, or what was said on that matter. (Tr. 210). She was also evasive when being questioned on cross-examination with regard to how she determined the Union allegedly agreed to remove the sub-holiday provision from the contract, when in fact the parties never had any conversations about that provision prior to November 6. (Tr. 210–220). In addition, she was evasive when being questioned on cross-examination about how the sub-holiday provision language went from being "stricken" in the Respondent's October 24 draft proposal (Jt. Exh. 5) to "deleted" in the tentative agreement if the parties never discussed it. (Jt. Exh. 6) (Tr. 210–220).

Johnson also presented conflicting and inconsistent testimony. She testified that one of the Respondent's main "objectives" in bargaining for the successor agreement was to remove the sub-holiday provision. That testimony, however, was inconsistent with the fact that Respondent's "2014 Union Negotiation Summary" (that Johnson drafted and distributed to the bargaining unit employees) never mentioned that one of the Respondent's "proposed goals" was to eliminate or remove the sub-holiday provision from the contract. (GC Exh. 2). Instead, Johnson's summary stated "The Company went into negotiations with 3 areas of focus. We intended to eliminate the Schedule Premium, change the Vacation Pay Calculation to a base rate of pay, and change the way Overtime is calculated." (GC Exh. 2, p. 5). Johnson also testified that in the November 6 session, Cervone said the Union would accept the Respondent's newly proposed wage schedule if the Respondent agreed to give them back the Easter holiday. (Tr. 221). That testimony, however, was inconsistent with the documentary evidence showing that the Respondent had already agreed to reinstate the Easter holiday before the November 6 bargaining session occurred. On cross-examination, Johnson then changed her testimony to reflect that the conversations about the Easter holiday actually occurred in the October 24 bargaining session, not in the November 6 bargaining session. (Tr. 232).

I also find that the testimony of Schwartz was not credible. He testified in a self-serving manner wherein he presented contrived, unbelievable, and implausible testimony. His testimony was also internally inconsistent, inconsistent with the undisputed documentary evidence, and inconsistent with Johnson's testimony. I find that the testimony of Schwartz was particularly incredible in his assertions that the Union did not inform him that the sub-holiday provision was one of the issues that caused the ratification vote to fail, and that the Union failed to mention keeping the sub-holiday provision in the contract in the November 6 bargaining session. I similarly discredit his assertion that he did not agree to keep that provision in the contract in exchange for the Union's acceptance of his wage proposal. In finding that Schwartz's testimony is not credible or believable, I specifically note the following:

(1) With regard to Schwartz's inconsistent testimony, I note that his testimony about the facts of November 6 was inconsistent with the assertions he made while questioning Silva.[9] When Schwartz was questioning Silva on cross-examination about what was said in the November 6 bargaining session as he (Schwartz) was signing off on the sub-holiday provision on page 10 of the contract, he stated:

> Q. "And do you recall, Jose, that as I was signing the document I looked up…at you and you said to me: this relates to the emails that we had? And I said: yeah. The email we had about Section 4."
> A. "No." (Tr.73).

However, when Schwartz offered testimony as a witness on behalf of the Respondent, he testified to the opposite—that it was he (Schwartz) who asked if the notation was pertaining to the emails. Specifically, Schwartz testified: "In fact, as I recall, as I was signing this, I recall looking up and saying to Jose: This is regarding the e-mails we had, and him nodding in affirmance." (Tr. 272).

(2) Schwartz's testimony, like that of Johnson's, was inconsistent with the undisputed documentary evidence. Schwartz, like Johnson, testified that it was critical for the Respondent to remove the sub-holiday provision from the contract because it was one of the Respondent's main goals in bargaining for the successor agreement. However, the Respondent's "2014 Union Negotiations Summary," created by Johnson and provided to the bargaining unit employees, failed to identify removal of the sub-holiday provision as one of the Respondent's "proposed goals." (GC Exh. 2).

(3) Critically, Schwartz's testimony was inconsistent with Johnson's testimony. Schwartz testified that the Union only presented one issue in the November 6 bargaining session—wages. (Tr. 265). Johnson, on the other hand, testified that in the November 6 session there were two issues presented by the Union—one was wages and the other was an item that the Respondent removed from the contract proposal that the Union wanted to have reinstated. (Tr. 190–193). She elaborated further, testifying that the item Respondent removed was "one of those items that no other Amcor location has" which at the time she believed was the Easter holiday. (Tr. 193). Significantly, no explanation was offered by the Respondent as to why its two key (and only) witnesses differed on this important point.

(4) On that same subject, while Schwartz testified that Cervone's acceptance of the Respondent's wage proposal was not conditioned on keeping either the Easter holiday or the sub-holiday provision in the contract (Tr. 296–297), Johnson testified that the Union's acceptance of the wage proposal was, in fact, conditioned on the Respondent's leaving something in the contract that the Union wanted in return, which on her direct-examination testimony she believed was the Easter holiday. Johnson specifically testified that Cervone was the person who requested the conditional offer when he told her he could recommend the Union's acceptance of

[9] Although I do not base my credibility findings on Schwartz's assertions while questioning the witness because such are not testimony under oath, I nevertheless find such assertions persuasive and noteworthy when examining the stated facts in those statements in comparison to the stated facts made in his statements under oath.

the Respondent's new wage scale proposal if the Respondent agreed to give the Union back the Easter holiday. (Tr. 221–222). Johnson testified that Schwartz then made that conditional offer to the Union, and it was accepted. (Tr. 193). The record is also devoid of any explanation for the conflicting testimony of the Respondent's witnesses on this important matter.

(5) As mentioned above, the record reveals that the Respondent agreed to reinstate the Easter holiday as a recognized holiday prior to the November 6 bargaining session. That evidence consisted of the proposed draft of the contract presented by the Respondent for ratification, which already contained the Easter holiday (Jt. Exh. 8, p. 7), and the Respondent's "2014 Union Negotiation Summary," authored by Johnson, that notified the employees that Respondent was willing, in the "final proposal," to "[a]llow [e]mployees to keep Easter and the floating holiday[,] the 2 holidays the company intended to eliminate" (GC Exh. 2, p.4; Tr. 225–226). On cross-examination, Johnson changed her testimony to claim the conversations about the Easter holiday actually occurred in the October 24 bargaining session, not in the November 6 bargaining session. (Tr. 232). Significantly, however, Johnson never retracted nor corrected her testimony that the Union's acceptance of the Respondent's wage proposal on November 6 was conditioned upon something in return, in essence a "quid pro quo," and that she had to call her plant manager at a caucus during that session to get his approval to give the Union what it was demanding to get the contract done. (Tr. 193).

While I have found Johnson to be an incredible witness, and I do not believe her assertion that the sub-holiday provision was never raised in the November 6 bargaining session, I do believe her assertion that the Respondent agreed to give the Union something back in the contract that it wanted in exchange for acceptance of the Respondent's wage proposal. Contrary to Johnson's and Schwartz's denials however, I find that item was the sub-holiday provision. That finding is plausible when consideration is given to the credible evidence offered by the General Counsel's witnesses, and the documentary evidence showing that Schwartz signed on page 10 of the draft proposal signifying his agreement that the sub-holiday provision "stays in" the contract. (GC Exh. 8). In addition, Johnson testified that the Union offered to accept the wage proposal if the Respondent would put back into the contract a certain provision that was taken out, and that certain provision, which was only found in the Batavia bargaining unit, required her plant manager's approval during that session for its reinstatement. Since the record establishes that the Easter holiday could not have been that provision, the only plausible item it could have been was the sub-holiday provision.

(6) I also find that Schwartz's testimony that the Union only raised one issue—wages—is not plausible considering the credible facts of this case. Initially, I find it implausible that the Union would mislead the Respondent as to what the issues were that lead to the unit employees' rejection of the contract in the ratification vote. Instead, it is reasonable to believe that the Union, rather than hide one of the reasons for the contract's rejection, would have made it very clear in that final bargaining session what the employees required in the contract to approve it. Secondly, if the wage proposal really was the only issue holding up an agreement on the contract, it stands to reason that Schwartz would have simply signed off on the new wage proposal that he attached to the contract. Instead, he also signed off on page 10 of the agreement where the notation "stays in" is connected by a line to the deleted sub-holiday provision. One would think that if in fact Schwartz's assertions were true, he would have questioned why Cervone wanted to sign off on the vacation page of the contract when in fact there was no issue

other than wages. And thirdly, if in fact there was only one issue as Schwartz testified, why was it necessary for Johnson to seek her plant manager's approval during that session to include something else in the contract that the Respondent had previously taken out? If Schwartz's testimony were true, it would stand to reason that Johnson could have agreed to the wage proposal without calling to get her plant manager's approval. Thus, Schwartz's testimony is simply not plausible or believable on this subject.

(7) In addition, I find that Schwartz's testimony that he signed off on page 10 of the proposal because he had received the October 29 email from Silva wherein Silva mistakenly objected to the Respondent's withdrawal of Article 10, Sec.4 "Scheduling Vacations" from the draft proposal (Tr. 272; Jt. Exh. 7), is not believable or credible. In that connection, Schwartz testified: "I wanted to make sure that Mr. Silva understood that I was in agreement with his email." (Tr. 272). In addition, Schwartz asserted that he signed page 10 by the notation "stays in" because he "was agreeing to keep Sec. 4 per Silva's email." (Tr. 273). I do not credit these assertions, nor do I credit Schwartz's testimony that he told Silva on November 6, when he signed off on page 10 of the proposal: "This is regarding the emails we had," and that Silva allegedly nodded in affirmance. (Tr. 274).

Schwartz's assertions in this regard are self-serving, nonsensical, implausible, and simply not credible. In the first place, it is clear from the record that Silva made a mistake when he referenced Section 4 "Scheduling of Vacations" in his October 29 email. The record reveals that the Scheduling of Vacations provision was originally found in the 2010–2014 collective-bargaining agreement at Article 10, Section 3. (Jt. Exh. 1). While the Respondent's initial draft proposals contained that provision at Article 10, Sec.4, the draft proposal the parties eventually agreed upon in the November 6 bargaining session had the Scheduling of Vacations provision in Article 10, Sec.3 (Jt. Exh. 8).[10] It is important to note that in none of the Respondent's proposed agreements had it ever removed that provision from the contract, nor had it ever suggested that it be removed. When Silva informed Schwartz in his October 29 email that the Respondent had removed that provision from the contract, when in fact Schwartz knew he had never done so in the first place, it would have been apparent that Silva made a mistake. Instead of pointing that out to Silva, Schwartz simply assured Silva that the provision was going to stay in the contract in a reply email that same day. (Jt. Exh 7). Thus, I find that Schwartz's assertion that signing off on page 10 was to show that he "was agreeing to keep Sec. 4 per Silva's email," when in fact the Respondent never removed it in the first place, and after Schwartz had previously assured Silva by email that it was staying in the contract in any event, is nonsensical and strains credulity. It is also implausible as it is reasonable to believe that if in fact Schwartz's assertions were true, he would have asked Cervone why the line was drawn to the sub-holiday provision, instead of to the Scheduling of Vacations provision. One could also reason that Schwartz would have asked Cervone why the annotation on page 10 did not make reference to the Scheduling of Vacations provision. Instead, Schwartz, by his own admission, never asked Cervone for clarity as to what "stays in" meant, nor did he inquire as to what he was agreeing to initial off on. (Tr. 298).

[10] The record reveals that in the September 30 draft of the 2014–2018 agreement (Jt. Exh. 2) and the first October 14 proposal (Jt. Exh. 3) the provision was changed to Article 10, Sec. 4. In the second October 14 proposal (Jt. Exh. 4), the October 24 proposal (Jt. Exh. 5), and the October 27 proposal (Jt. Exh. 6), the Scheduling of Vacations provision was changed back to being identified as Article 10, Sec. 3. Finally, in the November 6 draft proposal the provision was in Article 10, Sec. 3. (Jt. Exh. 8).

(8) I further find that what makes Schwartz's assertions on this point even more unbelievable is the fact that the Scheduling of Vacations provision that he was allegedly affirming was to stay in the contract, is not even found on page 10 of the proposal—it is on page 9. The text of Article 10, Sec. 4 found on page 10, and that which Schwartz by his own testimony was confirming to "stay in" the contract, was the provision for "Vacation Request Process," and not the "Scheduling of Vacations" provision that was the mistaken subject of Silva's email. Thus, if Schwartz's assertions were true, it only stands to reason that he would have signed off on page 9 of the draft where the Scheduling of Vacations provision was found, which he undisputedly did not do.

(9) While I find that Schwartz incredibly testified that he was agreeing to keep the Scheduling of Vacation language that was never proposed to be deleted, I further find incredible his untenable assertion that he did not read the language and he did not know what he was signing. (Tr. 283–284). This claim is without support and is not credible. It was the Respondent, not the Union that created the draft proposal the parties worked with and signed during the November 6 session. (Tr. 35–36, 270; Jt. Exh. 6 and 8). Schwartz had emailed the Respondent's last offer to the Union on October 27, which was the document the parties worked with on November 6. Therefore, Schwartz had a copy of the underlying document. If in fact Schwartz's truly believed he was signing another section of the proposal (Tr. 285) or that he was unsure as to what he was signing and agreeing to (Tr. 273–274, 283–284), he had a copy of the document (that he created) in his possession, and all he had to do was look at it. Likewise, I find that Schwartz's testimony that he did not understand that "stays in" meant the sub-holiday provision stayed in the contract (Tr. 299) is equally unbelievable and implausible because if there was any ambiguity about that annotation, it is reasonable to believe that Schwartz, an experienced labor lawyer with 25 years of experience negotiating contracts, would have asked Cervone for clarification, or sought an explanation of what the drawn line meant, which in this case it is undisputed he did not do. (Tr. 298–299). I also find it is inconceivable to conclude that Schwartz would agree in writing in the final hours of negotiations to keep language which he never proposed to delete in the first place, without any questions or discussions, and without reading it.

(10) In addition, I find Schwartz's claim that the Union was to blame for his allegedly not knowing what he was signing because when he left the November 6 meeting he did not have a copy of the agreement, and the Union did not provide him with a copy until sometime after January 22, 2015. (Tr. 292–294), is unfounded and without support in the record. This assertion is baseless because he could have asked for a copy of the contract, but he admitted that he did not request one. (Tr. 295). Schwartz also admitted that even though he was aware the ratification vote passed on November 7, he did not ask for a copy of that contract at that time either. (Tr. 296).

(11) Finally, I find further evidence establishing that Schwartz's testimony is not credible can be found in his communication with the Union after the November 6 bargaining session. After it was brought to Schwartz's attention that the Union took issue with the fact that the sub-holiday provision was not in the final draft of the contract, Schwartz sent an email to Cervone and Silva dated January 29, 2015, wherein he addressed the Respondent's failure to include the sub-holiday provision in the final draft of the contract by stating that the "signed off" document initialed on November 6 "could be read to indicate that the Company 'agreed' to keep

the sub holiday provision in the new agreement." (Jt. Exh. 12). If in fact Schwartz truly did not agree to keep the sub-holiday provision in the contract as he alleged, a more plausible response would have consisted of a stern and adamant statement from Schwartz to Cervone, stating that he never entered into any such agreement with the Union on November 6. However, he failed to do that. Instead, Schwartz's response was to acknowledge that the "signed off" document could in fact evince Respondent's agreement to keep the sub-holiday provision in the contract. I find that response serves as further evidence that Schwartz's testimony and assertions are not credible, believable, or plausible.

On the basis of the above, I find that the credible record evidence establishes, as the General Counsel's witnesses have alleged, that in the November 6 bargaining session, Cervone informed the Respondent that wages and the sub-holiday provision were issues, that the Union would agree to the Respondent's wage proposal if the Respondent would agree to keep the sub-holiday provision in the contract, and that Schwartz verbally agreed to that proposal. In addition, I find that Schwartz thereafter indicated in writing that the sub-holiday provision would stay in the contract by signing off on Cervone's notation of "stays in" which was connected by a written line to the deleted sub-holiday provision.

C. The Issues

The issues presented in this case are whether the parties had a "meeting of the minds" with regard to keeping the sub-holiday provision in the successor collective-bargaining agreement, and whether the Respondent's statement on February 4, 2015, that it would not sign a contract that contained the sub-holiday provision, and consistent with that, its subsequent refusal to execute any contract that contained the terms and conditions of employment agreed to by the parties on November 6, 2014, constituted a violation of Section 8(a)(5) and (1) of the Act.

D. The Contentions of the Parties

The General Counsel and the Union allege that in the November 6, 2014 bargaining session, the Respondent agreed in unambiguous terms to keep the sub-holiday provision in the contract in exchange for the Union's agreement to accept the Respondent's wage proposal. The General Counsel alleges that the Respondent's oral refusal to execute a written contract containing the sub-holiday provision as the terms reached on November 6, violated Section 8(a)(5) and (1) of the Act.

The Respondent alleges that it consistently took the position that the sub-holiday provision be removed from the contract, and the Union agreed to its removal and presented that proposal to the membership for ratification on November 4, 2014. The Respondent also alleges that the sub-holiday provision was never identified as an issue in the final negotiating session on November 6, the parties never discussed the sub-holiday provision that day, and it never agreed to keep the provision in the contract.

With regard to the November 6, 2014 bargaining session, the Respondent contends that the line drawn by Cervone from the "stays in" notation is ambiguous as "it is unclear to where the line points" (Resp. Brief p. 2), and that the "stays in" language and the line drawn from it does not appear to refer to anything, and is therefore ambiguous." (Resp. Brief p. 20). In

addition, the Respondent contends that the Union's argument that the "stays-in" language shows Respondent agreed to retain the sub-holiday provision on November 6 relies solely on Schwartz's alleged "unilateral mistake," which as a matter of law the Union cannot exploit to its advantage. (Resp. Brief at p. 3). Furthermore, Respondent contends that even if Schwartz intended to retain the sub-holiday provision, he could not have done so since he allegedly did not have authority "for such drastic action." (Resp. Brief at p. 11). Finally, the Respondent argues that when the Union asked the Respondent to sign an agreement that retained the sub-holiday provision, it never provided Respondent with its version of the agreement (Resp. Brief at p. 13), and therefore it was not "presenting an agreement that reflected a meeting of the minds." (Resp. Brief at p. 3).

Based on these arguments, the Respondent argues that the General Counsel has not met the burden of showing that the Respondent refused to sign a contract reflecting the parties' meeting of the minds, and that the complaint should be dismissed.

E. Analysis

It is well established that the obligation to bargain collectively under Section 8(d) of the Act requires either party, upon the request of the other, to execute a written contract incorporating an agreement reached during negotiations. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). The Board has held however, that the obligation to execute a written contract arises only after a "meeting of the minds" has been reached on all substantive issues and material terms, provided there was in fact the intent to have a contract. *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004); *Sunrise Nursing Home*, *Inc.,* 325 NRLB 380, 389 (1998); *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1192 (1992); *In re Buschman Co*., 334 NLRB 441, 442 (2001). The Board has also determined that it is the General Counsel's burden of showing that the parties not only had the requisite "meeting of the minds" on the agreement reached, but also that the document the respondent refused to execute accurately reflected the agreement of the parties. *Hempstead Park Nursing Home*, supra at 322; *Windward Teachers Assn.,* 346 NLRB 1148, 1150 (2006).

The Board has held that in situations where there is reliance on a document to prove intent, the principles of contract law are applied to determine whether the parties reached a "meeting of the minds." If the terms of the document are unambiguous, the parties' "meeting of the minds" is based on objective terms of the contract rather than subjective understanding (or misunderstandings) of the terms by the parties. *Hempstead Park Nursing Home*, supra at 322. However, if the document contains terms that are ambiguous and the parties attach different meanings, a "meeting of the minds" is not established. In addition, if as a result of the ambiguity the misunderstanding is neither party's fault or both parties are to blame, there is no "meeting of the minds" and that seeming agreement will not create a contract. Id. at 322–323.

The Board has also held that a party's signifying assent to an unsigned paper can serve as the formation of a contract. *New Orleans Stevedoring Co*., 308 NLRB 1076, 1081 (1992); *Kelly Private Car Service*, 289 NLRB 30, 39 (1988). The fact that parties may plan to sign an agreement later does not preclude the prior formation of that contract by signifying assent to an unsigned paper. *Kelly Private Car Service*, supra at 39. The Board has found that the issue is one of intention, and thus the question is whether the parties intended to have a contract as evidenced by a "meeting of the minds." Id. In determining whether an agreement has been

reached by the parties, the Board has held that it is not strictly bound to "the technical rules of contract law but is free to use general contract principles adapted to the collective-bargaining context." *New Orleans Stevedoring Co*., supra at 1081; citing *NLRB v. Electra-Food Machinery, Inc.,* 621 F.2d 956, 958 (9th Cir. 1980).

With regard to the Respondent's assertion that the parties did not have a "meeting of the minds" on November 6 to include the sub-holiday provision in the contract, it initially argues in its brief that it consistently took the position that the sub-holiday provision be removed from the contract, and that the Union agreed to its removal and presented that proposal to the membership for ratification on November 4, 2014. While it is true the record establishes that up to the November 6 bargaining session, the Respondent maintained its position that it wished to remove the sub-holiday provision from the contract, it also establishes that the parties never had discussions indicating that the Union agreed to remove that provision from the contract. Regardless of whether the Union "agreed" to Respondent's removal of the provision, the record clearly shows that the Union nevertheless presented the Respondent's October 27 proposal, *sans* the sub-holiday provision, to the union membership for a ratification vote on November 4. I find that while these facts provide relevant information pertaining to the bargaining leading up to the final bargaining session on November 6, they do not necessarily provide proof of whether or not the parties had a "meeting of the minds" on including the sub-holiday provision in the November 6 bargaining session. In fact, whether or not the Union agreed to keep the sub-holiday provision in the draft proposal on October 24 is of little consequence when analyzing the critical issue in this case—whether the Respondent agreed in the November 6 bargaining session to keep the sub-holiday provision in the successor contract in exchange for the Union's agreement to accept the Respondent's wage proposal.

The Respondent also alleges in its brief that the sub-holiday provision was never identified as an issue in the final negotiating session on November 6, the parties never discussed the sub-holiday provision that day, and it never agreed to keep the provision in the contract, as the Union alleges it had done. As mentioned above, I have soundly discredited these assertions, and likewise, I find no merit in the Respondent's arguments based upon them.

I find that the credible evidence and the undisputed documentary evidence establish that the Respondent agreed in the November 6 bargaining session to keep the sub-holiday provision in the contract in exchange for the Union's agreement to accept the Respondent's wage proposal, thus evincing the requisite "meeting of the minds" on the parties' agreement to include the sub-holiday provision in the collective-bargaining agreement. In that November 6 bargaining session, Cervone informed the Respondent that wages and the sub-holiday provision were issues, and that the Union would agree to the Respondent's wage proposal if the Respondent would agree to keep the sub-holiday provision in the contract. Schwartz was specifically asked by Piekarski if he was agreeing to keep the sub-holiday provision in the contract, and he answered "yes, it's going to stay." While Silva asked Cervone to get the agreement on the sub-holiday provision in writing, Cervone pointed to the sub-holiday provision in the right hand margin of the page where Schwartz proposed to delete it, and he asked Schwartz if the sub-holiday provision was going to stay in the contract, and Schwartz agreed that it would stay in. Cervone then wrote on the top of page 10 of the Respondent's proposed contract, "stays in," and drew a line with his pen from that notation down to and touching the upper left corner of the red box containing the deleted sub-holiday provision in the right hand margin of the page. Cervone

evidenced the Union's agreement to keep the sub-holiday provision in the contract by initialing the page for the Union, and Schwartz indicated Respondent's agreement to include the sub-holiday provision by signing his name for the Company next to the "stays in" notation and the drawn line, thus clearly evincing Respondent's written agreement to keep the sub-holiday provision in the contract. The credible evidence establishes that neither Schwartz, nor anyone else from the Respondent's bargaining committee, ever expressed confusion over what they were agreeing to or asked questions seeking clarification on what they had agreed to.

The parties then executed a memorandum of understanding at the completion of the November 6 bargaining session, confirming their agreement to the terms of the collective-bargaining agreement, which was the document the parties had just signed off on. (Jt. Exh. 8). It is undisputed that the parties reached an agreement on November 6.[11] The Union informed Schwartz at the close of the November 6 session that the Union was going to take the agreement (Jt. Exh. 8) to a second ratification vote. On November 7, the agreement was ratified. Approximately 2 months after the contract was ratified, the Respondent provided the Union with an integrated copy for signature. The Union noticed errors in the agreement, including the deletion of the sub-holiday provision. All discrepancies were resolved by the parties, except for the deletion of the sub-holiday provision. On January 29, 2015, the Respondent, by Schwartz, informed the Union that it would not agree to include the sub-holiday provision in the contract that the parties had agreed to in that final negotiation session on November 6, 2014, and on February 4, 2015, the Respondent informed the Union for the first time that the sub-holiday provision in the contract was a mistake and no agreement would be signed with that provision in it. Thereafter, the Respondent never executed a contract containing the terms and conditions agreed to by the parties on November 6, and the Respondent thereafter has denied employee requests to use the sub-holiday provision.

In analyzing this case, I first find that the sub-holiday provision in the collective-bargaining agreement is a material term and a substantial issue, as the provision allows the employees to substitute days off for any days during the calendar year if their vacation days fall on a holiday, and that single provision has resulted in the Respondent's refusal to sign any agreement that contains it. Thus, I find that the obligation to execute a written contract arose after the parties' "meeting of the minds" on all substantive and material terms and the intent evinced by the parties to have a contract on November 6, 2014.

I also find that the written agreement that the parties signed off on and executed with a memorandum of understanding on November 6, 2014 (Jt. Exh. 8), is unambiguous in its terms, especially with regard to the inclusion of the sub-holiday provision in that agreement. While the Respondent contends that the line drawn by Cervone from the "stays in" notation is ambiguous because it is allegedly "unclear to where the line points," and allegedly "does not appear to refer to anything," (Resp. Brief pp. 2 and 20), those contentions are not supported by the record. I find there is nothing ambiguous about the written notation of "stays in" on page 10, or the line that connects it directly to and touching the upper left corner of the red-boxed deleted portion of the sub-holiday provision in the right hand margin of the document. That notation and drawn line evince the parties' clear, unequivocal, and unmistakable intent to agree to the sub-holiday

[11] As the Respondent admitted in its answer to the complaint. GC Exh. 1(d) (complaint) and GC Exh. 1(f) (answer).

provision's inclusion in the contract. I further find the assertion of ambiguity is not only without support, it is belied by the fact that at the time of signing off on the inclusion of that language, Schwartz never sought nor asked Cervone for clarification of the notation and line. It stands to reason that if in fact the Respondent believed the notation and line were ambiguous, Schwartz would have asked for clarification or for the meaning of such a notation and drawn line. Instead, no requests for clarification were made by the Respondent.

I also find that the credible record evidence establishes that Schwartz freely, willingly, and knowingly agreed to include the sub-holiday provision in the contract in exchange for the Union's agreement on the Respondent wage proposal, and that there was no "mistake" about his agreement to do so. This finding is established by the fact that Schwartz was asked by both Piekarski and Cervone if he was agreeing to include the sub-holiday provision in the contract, and he answered both with "yes." In fact, Cervone actually pointed to the sub-holiday provision when he asked Schwartz if he agreed to that provision staying in the contract. Schwartz also admitted that he willingly signed the notation on page 10 *after* Cervone made the annotation and drew the line to the sub-holiday provision. (Tr. 285). Thus, the Respondent's assertion that inclusion of the sub-holiday provision was somehow a mistake is not supported by the credible testimony or the undisputed documentary evidence, and it is without merit.

Along the same line as the Respondent's "mistake" allegation, as discussed above, Schwartz also claimed: (1) he thought he was signing another section of the proposal (Tr. 285), when in fact the evidence revealed he signed off on including the sub-holiday provision after Cervone wrote "stays in" and drew a line to the sub-holiday provision, after he neglected to ask Cervone for clarification of what "stays in" or the drawn line meant; and after the provision he believed he was signing turned out to be on a different page of the agreement; (2) he was unsure as to what he was signing and agreeing to (Tr. 273–274, 283–284), when the evidence reveals that the Respondent created the document the parties were working from in that session, and he could have looked at it; and (3) that the Union did not provide him with a copy of the agreement until sometime after January 22, 2015 (Tr. 292–294), when in fact the evidence showed that he never asked for a copy of the agreement. As mentioned in the credibility section of this decision, I find these assertions by Schwartz to be incredible, and I likewise find those allegations by the Respondent in support of its case to be baseless and without merit.

The Respondent also contends that even if Schwartz intended to retain the sub-holiday provision, he could not have done so since he allegedly did not have the authority "for such drastic action." (Resp. Brief at p. 11). In the first place, I note that Schwartz's claim of lack of authority on this single issue is premised on the Respondent's assertion that this issue was a "primary objective" for the Respondent, and that he needed permission before agreeing to keep the language in the contract. (Tr. 274–275, 300). As mentioned above, however, the evidence is at odds with that claim, as Respondent's "2014 Union Negotiation Summary" (GC Exh. 2) fails to mention removal of the sub-holiday provision as a goal or primary objective. In addition, Schwartz never at any time prior to arriving at an agreement on November 6, expressed to the Union that his authority was limited in any manner or that he needed prior approval from anyone before agreeing to terms and/or signing a contract. (Tr. 26). Cervone's and Silva's testimony that Schwartz never expressed any limitation on his authority was convincing and dispositive on this issue.

Furthermore, Schwartz, as the chief negotiator for the Respondent, never provided the Union with clear notice that he had any alleged limited authority in negotiating the contract (Tr. 26), as it was incumbent upon him to do, if in fact that was the case. The Board has held that "the law is clear that when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." *Sands Hotel & Casino*, 324 NLRB 1101, 1108–1109 (1997) (quoting *University of Bridgeport*, 229 NLRB 1074 (1977). I find that it strains credulity to believe that an experienced counsel such as Schwartz, who negotiated many contracts over his career, would fail to notify the Union of such lack of authority if in fact it were true. Thus, having determined that Schwartz had authority without expressed limitation to agree to terms or finalize an agreement, I find that he agreed to the terms of the successor agreement on behalf of the Respondent, which included the sub-holiday provision.

Finally, the Respondent argues that when the Union asked the Respondent to sign an agreement that included the sub-holiday provision, it never provided Respondent with its version of the agreement (Resp. Brief at p. 13), and therefore it was not "presenting an agreement that reflected a meeting of the minds." (Resp. Brief at p. 3). I find this argument also lacks merit. The record reflects that throughout all the bargaining sessions, the parties were working from the Respondent's computer drafts of the contract. When the parties reached agreement on the contract (which was comprised of Jt. Exh 8 and the memorandum of understanding) they signed off on a draft created by the Respondent. The Respondent then provided the Union with the final draft of the agreement for signature, but that agreement did not contain all the terms of the November 6 agreement as the sub-holiday provision was missing. The Union did not sign the agreement, but instead correctly asked the Respondent to include the sub-holiday provision in the final draft and then requested that Respondent sign it. In this connection, on February 4, 2015, Silva met with Johnson and Lobezoo for a labor-management meeting. (Tr. 50–51). During that meeting, Silva informed Johnson that the sub-holiday provision should be included in the draft because it was agreed to on November 6, and he requested that she sign it, otherwise the Union would be forced to file charges with the NLRB. (Tr. 51). Johnson refused to sign the contract, and told Silva the November 6 agreement was a "mistake," the Respondent did not agree to keep the sub-holiday provision in the contract, and it would not sign a contract that included the sub-holiday provision. (Tr. 51). It is thus undisputed that since February 4, 2015, Respondent has refused to execute any contract containing the sub-holiday provision.

It appears the Respondent's argument on this point is that even though the Union asked it to sign the contract that included the terms of what it admitted was an agreement on November 6 (including the sub-holiday provision), which the Respondent unequivocally refused to do, it did not violate the Act because the Union neglected to provide the Respondent with its own version of the agreement that included the sub-holiday provision in it. In other words, under the facts of this case, even though the Union asked the Respondent to sign the agreement reached on November 6, which it said it would not do, the Union was nevertheless required to take the Respondent's draft and retype it with the sub-holiday provision in it, and then present it to the Respondent and request that it be signed. I find no merit to this assertion. In the first place, to require such action under the facts of this case would require an exercise in futility, as the Respondent had already unequivocally stated that it would not sign an agreement that included that provision. Second, the Respondent failed to provide any case law to show that such actions would be required by the Board under facts similar to the instant case. And third, it is well

settled that an employer who fails to reduce to writing and apply an agreement reached with the bargaining representative of its employees violates the Act. *Maury's Fluorescent & Appliance Service*, 226 NLRB 1290, 1292 (1976); *H.J. Heinz Co*., supra at 526. The Respondent was therefore obligated to include the sub-holiday provision in the final draft of the contract, and it was then further obligated to execute that contract when the Union requested it.

As noted above, the Board has held that the General Counsel has the burden of showing not only that the parties had the requisite "meeting of the minds" on the agreement reached, but also that the Respondent refused to execute a document that accurately reflected that agreement. *Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006). I find that when Silva told Johnson that the sub-holiday provision should be included in the contract as was agreed to, and then requested that she sign that contract, the Union presented the Respondent with a contract which reflected the November 6 agreement of the parties. I further find that Johnson's statement that the Respondent would not sign a contract that had the sub-holiday provision in it, constituted an oral or verbal refusal to execute the agreement reached by the parties, thus demonstrating that the General Counsel not only met the burden of showing a "meeting of the minds" with regard to including the sub-holiday provision in the contract, but also the burden of showing that the Respondent failed and refused to execute a document that accurately reflected that agreement.

I note that well established legal precedent establishes that such oral or verbal refusals to execute a written contract that incorporates an agreement reached during negotiations, such as the agreement in this case to include the sub-holiday provision in the successor collective-bargaining agreement, constitute a violation of Section 8(a)(5) and (1) of the Act. *H.J. Heinz Co*, supra; *New Orleans Stevedoring Co*., supra; *Electra-Food Machinery, Inc*., 241 NLRB 1232, 1233 (1979), enfd. 621 F.2d 956 (9th Cir. 1980) (Board found respondent's refusal to execute a contract which embodied the terms agreed upon with the union, based solely on the inclusion of an open shop clause, constituted a violation of Section 8(a)(5) and (1) of the Act).

The Respondent, however, argues that there are two Board decisions that support its argument that there was "no meeting of the minds," and therefore, no violation of the Act—*Apache Powder Company*, 223 NLRB 191, 194–195 (1976) and *Mary Bridge Children's Hospital*, 305 NLRB 570, 573 (1991). With regard to *Apache Powder Company*, the Respondent argues that Schwartz "inadvertently" signed the agreement to keep the sub-holiday provision in the contract. The Respondent asserts that in *Apache Powder Co.*, the Board upheld the Administrative Law Judge's decision finding that the parties had not reached an agreement in negotiations to change the so-called "pension break date" in the contract. Id. at 191. In that case, the respondent's offer which was agreed to and incorporated into the contract, proposed a change in the existing multipliers of $5 (to $6) and $7.50 (to $9), respectively. Id. The union argued that it assumed respondent was offering to change the break date as well as the multipliers. However, the Board agreed with the Administrative Law Judge that such an interpretation was "so palpably at odds with the pension provisions of the existing contract as to put the [union] on notice of an obvious mistake by the respondent." Id. The Board reasoned that to change the break dates, the respondent would have increased the multiplier from $5 to $9, and such an assumption could not be reconciled with respondent's offer to change only the $5 multiplier to $6 and the $7.50 multiplier to $9. Id. The Board also agreed with the Administrative Law Judge's reasoning that "this mistake was so obvious so as to have placed a person of reasonable intelligence on guard; and that the terms of the initialed agreement, considered in context, are ambiguous with respect

to the intent of the parties concerning the break dates." Id. at 195. For those reasons, there was no meeting of the parties' minds as to the break dates. Id.

According to the Respondent, a "reasonably intelligent person would have surmised that when Mr. Schwartz placed his initials next to the 'stays in' language…he had no intention to change Amcor's consistently held position that the sub-holiday language was removed." (Resp. Brief at 18–19). I find however, that there is no merit to this argument, and that the Respondent's reliance on *Apache Powder Co.* is misplaced because the facts of that case are clearly distinguishable from a number of facts in the instant case. First, in the instant case, the record establishes that the "stays in" notation and drawn line are not ambiguous, but instead clearly reflect that parties' intent to keep the sub-holiday provision in the contract. Second, unlike the facts of *Apache Powder Co.*, Schwartz did not make a mistake when he signed off on the notation and drawn line. When Cervone and Piekarski asked him directly if he was agreeing that the sub-holiday provision was to "stay in" the contract if the Union accepted the Respondent's wage proposal, he answered both of them in the affirmative. Schwartz also failed to seek any clarification from Cervone pertaining to the notation and line that he drew, and he failed to ask for an explanation as to the meaning of the notation and line. Third, even assuming Schwartz made a mistake by signing off on the agreement to keep the sub-holiday provision in the contract, such a "mistake" is not so palpably at odds with the terms of that agreement so as to put the Union on notice of an obvious mistake by the Respondent. In fact, acceptance of the Union's request to keep the sub-holiday provision in the agreement was perfectly in keeping with the quid pro quo of the Union agreeing to the Respondent's wage proposal. Thus, in the instant case, the evidence does not establish that the Union had notice of the Respondent's purported "mistake" prior to the ratification vote on November 7, 2014. And fourth, even assuming Schwartz's agreement to keep the sub-holiday provision in the contract was a mistake, the Board has held that "rescission for unilateral mistake is, for obvious reasons, a carefully guarded remedy reserved for those instances where the mistake is so obvious as to put the other party on notice of an error." Id at 191. The instant case is clearly distinguishable from those cases where the mistake was obvious, or where the Union was on notice of the alleged mistake. On that basis, even assuming Schwartz's agreement was an error, rescission of the contract is not warranted.

In *Mary Bridge Children's Hospital*, 305 NLRB 570, 573 (1991), the Board affirmed the Administrative Law Judge's decision that the parties had not reached an agreement because of a mistake concerning night-shift bonuses. In that case, the Board affirmed the Administrative Law Judge's finding that there was no meeting of the minds since neither party intended to depart from the original method of calculating the bonuses and the record showed no hint that the employees would suffer particular hardship or prejudice if the employer were relieved of the consequences of the mistake. Id. at 572–573. The Respondent, citing *Mary Bridge Children's Hospital*, for support, argues that even if Schwartz inadvertently agreed to include the sub-holiday provision in the contract, it was a "mistake" that the Union should not be able to capitalize on. The Respondent argues that in *Mary Bridge Children's Hospital*, the Board held that "[i]f a written contract…is so drawn as not to correspond with the proved intention of the parties, the one who would be benefited by the error will not be permitted to enjoy these benefits." Id. at 573 (quoting Corbin, Contracts Sec. 606 at p. 655 (1951)).

I find the Respondent's reliance on *Mary Bridge Children's Hospital* is unpersuasive as it too is distinguishable from the facts of the instant case. The facts of the instant case establish that Schwartz did not make a mistake in agreeing that the sub-holiday provision was to stay in the contract. The record establishes that his agreement to keep the sub-holiday provision in the contract was knowingly and purposefully intended as his response to the Union's offer to accept the wage proposal as a quid pro quo for keeping the sub-holiday provision in the agreement. In addition, even assuming that Schwartz made a mistake, unlike the facts of *Mary Bridge Children's Hospital*, Schwartz, in agreeing to keep the sub-holiday provision in the contract in exchange for the Union's acceptance of the Respondent's wage proposal and getting the contract done, did in fact intend to depart from his original position of removing the sub-holiday provision from the contract. Finally, the instant case is distinguishable on the basis that, even assuming the inclusion of the sub-holiday provision was a mistake (which I have found it was not), relieving the Respondent from the consequences of that mistake by allowing that provision to be excluded from the contract, would result in hardship and prejudice to the employees because it would prevent them from exercising the right to sub-holidays at their request, which was a right secured through the collective-bargaining process.

Based on the record evidence in this case, and the well-established legal precedent discussed above, I find that the Union and the Respondent had the requisite "meeting of the minds" on November 6, 2014, to include the sub-holiday provision in the successor collective-bargaining agreement. I further find that the Respondent's oral refusal on February 4, 2015, to execute a written contract containing the agreed upon terms and conditions of employment for the unit employees that the parties reached on November 6, 2014, and its subsequent failure and refusal to execute a written contract which embodied the terms of that agreement reached by the parties on November 6, 2014, violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Chicago & Midwest Regional Joint Board, Workers United/SEIU (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been the exclusive collective-bargaining representative of the following appropriate unit:

> All full-time and regular part-time hourly paid production and maintenance employees at the Company's Batavia, Illinois location, but excluding all office clerical, professional employees, confidential employees, technical employees, sales employees, plant clerical employees, guards and supervisors as defined in the "National Labor Relations Act" as amended.

4. By failing to bargain in good faith with the Union by, since on or about February 4, 2015, orally informing the Union that it would not execute a written contract, and thereafter failing and refusing to execute any written contract containing the agreement reached on November 6, 2014, for the unit employees' terms and conditions of employment, and thereby failing and refusing to

comply with and abide by the terms of the collective-bargaining agreement effective by its terms from November 1, 2014 through October 31, 2018, the Respondent violated Section 8(a)(5) and (1) and of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall require the Respondent to, upon request, execute the collective-bargaining agreement reached with the Union on November 6, 2014, effective by its terms from November 1, 2014 to October 31, 2018, containing the terms and conditions of employment for the unit employees, which includes the sub-holiday provision of Article X, Section 5 entitled "Holidays which Fall During Scheduled Vacations" on page 12 of the parties' 2010-2014 collective-bargaining agreement, and to abide by the terms of that agreement. I shall also require the Respondent to make whole the unit employees for any losses they may have suffered as a result of the Respondent's failure execute the collective-bargaining agreement, including but not limited to any losses resulting from the Respondent's failure to implement the sub-holiday provision, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[12]

ORDER

The Respondent, Amcor Rigid Plastics, Batavia, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to execute and comply with the successor collective-bargaining agreement which embodies the terms of the agreement covering the production and maintenance unit at its facility in Batavia, Illinois, reached on November 6, 2014, between itself and the Chicago & Midwest Regional Joint Board, Workers United/SEIU (Union).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, forthwith execute the collective-bargaining agreement as requested by the Union on February 4, 2015, containing the terms and conditions of employment for the employees as agreed to by the parties on November 6, 2014, which includes the sub-holiday provision of Article X, Section 5 entitled "Holidays which Fall During Scheduled Vacations" on page 12 of the parties' 2010-2014 collective-bargaining agreement, in the following appropriate production and maintenance unit:

> All full-time and regular part-time hourly paid production and maintenance employees at the Company's Batavia, Illinois location, but excluding all office clerical, professional employees, confidential employees, technical employees, sales employees, plant clerical employees, guards and supervisors as defined in the "National Labor Relations Act" as amended.

(b) Make whole all affected bargaining unit employees for any losses they may have suffered as a result of the Respondent's failure and refusal to execute the parties' collective-bargaining agreement reached on November 6, 2014, including but not limited to any losses resulting from the Respondent's failure to implement the sub-holiday provision of the collective-bargaining agreement.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the number of vacation days due employees requested under the sub-holiday provision of the collective-bargaining agreement, and under the terms of the Order.

(d) Within 14 days after service by the Region, post at its Batavia, Illinois facility, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 4, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 6, 2015

Thomas M. Randazzo
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to sign the collective-bargaining agreement reached on November 6, 2014 with the Chicago & Midwest Regional Joint Board, Workers United/SEIU (the Union) which embodies the terms and conditions of employment for our employees, including the sub-holiday provision of Article X, Section 5 entitled "Holidays which Fall During Scheduled Vacations," in the following appropriate unit:

> All full-time and regular part-time hourly paid production and maintenance employees at the Company's Batavia, Illinois location, but excluding all office clerical, professional employees, confidential employees, technical employees, sales employees, plant clerical employees, guards and supervisors as defined in the "National Labor Relations Act" as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, forthwith execute the collective-bargaining agreement reached with the Union on November 6, 2014, containing the terms and conditions of employment for our employees in the bargaining unit, which includes the sub-holiday provision of Article X, Section 5 entitled "Holidays which Fall During Scheduled Vacations," on page 12 of the parties' 2010–2014 contract, and abide by the terms of said agreement.

WE WILL make whole all bargaining unit employees for any losses they may have suffered as a result of our failure and refusal to execute the parties' collective-bargaining agreement reached on November 6, 2014, including but not limited to any losses resulting from our failure to implement the sub-holiday provision of the collective-bargaining agreement.

AMCOR RIGID PLASTICS
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

The Rookery Building
209 South LaSalle Street, Suite 900
Chicago, IL 60604-5208
(312) 353-7570
Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-145992 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.